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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD D. PUTTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 10, 1955.

OPINIONS BELOW

The majority and concurring opinions in the Court of Appeals (App., *infra*, pp. 1a-17a, R. 156-167) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 10, 1955 (App., *infra*, p. 17a, R. 168). On April 8, 1955, Mr. Justice Douglas extended the

time for filing a petition for a writ of certiorari to and including May 9, 1955 (App., *infra*, p. 18a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the 1950 Organic Act of Guam, as originally enacted, requires that criminal prosecutions for felonies be instituted by indictment returned by a grand jury.

2. If the answer to the preceding question is affirmative, whether Congress has the power to amend and correct the Organic Act of Guam retrospectively to provide that prosecutions for felonies committed in Guam since the Organic Act was passed need not be instituted by indictments returned by a grand jury.

3. Similarly, whether Congress has the power to validate a criminal trial and conviction in Guam (under the 1950 Organic Act) for a felony based on an information, by providing that such conviction shall not be reversed or set aside for want of an indictment.

STATUTES AND RULE INVOLVED

The Organic Act of Guam, Act of August 1, 1950, c. 512, 64 Stat. 384 ff., 48 U. S. C. 1421 ff., provides in part:

Section 3, 48 U. S. C. 1421a.:

> Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. * * *

Sec. 22(b), 48 U. S. C. 1424(b):

> The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code, in civil cases; section 2073 of title 28, United States Code, in admiralty cases; sections 3771 and 3772 of title 18, United States Code, in criminal cases; and section 30 of the Bankruptcy Act of July 1, 1898, as amended (title 11, U. S. C., sec. 53), in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom.

Section 22 of the Organic Act of Guam was amended by the Act of August 27, 1954, 68 Stat. 882, which provides:

> That subsection (b) of section 22 of the Organic Act of Guam (64 Stat. 389), is amended by striking out the period at the end of such subsection and inserting in lieu thereof the following: "; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, * * * "
>
> Sec. 2. The amendment made by section 1 shall be deemed to be in effect as of August 1, 1950.

Sec. 3. No conviction of a defendant in a criminal proceeding in the District Court of Guam heretofore had shall be reversed or set aside on the ground that the defendant was not indicted by a grand jury or tried by a petit jury.

Sec. 4. If any particular provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Rule 7 (a), Federal Rules of Criminal Procedure, provides:

> *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

STATEMENT

On October 15, 1952, a twenty-two count information was filed in the District Court of Guam charging respondent with conspiracy and theft of government property in violation of 18 U. S. C. 371 and 641 (R. 3-10). He was tried by the court with-

out a jury on January 27, 1953, found guilty on the first four counts, and sentenced to three years on each count, the concurrent sentences on counts three and four to run consecutively to the concurrent sentences on counts one and two (R. 30-31). On appeal to the United States Court of Appeals for the Ninth Circuit, respondent contended, *inter alia,* that the conviction was invalid in that he had not been indicted by a grand jury, or tried by a petit jury, and had not waived such rights (R. 41).

While the appeal was pending, the Court of Appeals for the Ninth Circuit ruled in another case that the Organic Act of Guam (64 Stat. 384, 48 U. S. C. 1421-1424(b)), by providing in Section 22 (supra, p. 3) that the Federal Rules of Criminal Procedure should apply to criminal prosecutions in Guam, made Rule 7(a) (*supra,* p. 4) applicable and thus required that a prosecution for a felony be instituted by indictment returned by a grand jury. *Pugh* v. *United States,* 212 F. 2d 761 (involving a motion under 28 U. S. C. 2255); *Hatchett* v. *Guam,* 212 F. 2d 767 (on direct review of a conviction).[1] The Government of Guam filed a petition for certiorari to this Court in the *Hatchett* case (No. 175 O. T. 1954).

After Congress amended the Organic Act of Guam on August 27, 1954, to provide that the Federal Rules of Criminal Procedure requiring trial

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[1] In the *Hatchett* case, the court ruled that the defendant was not entitled to a trial by petit jury since the Federal Rules of Criminal Procedure did not compel it.

by jury or prosecution of felonies by indictment returned by grand jury should not apply to Guam, and that the amendment should have retroactive effect (*supra*, pp. 3-4), the petition for certiorari in the *Hatchett* case was withdrawn (348 U. S. 801). Upon passage of the 1954 amendment and withdrawal of certiorari in the *Hatchett* case, the instant case, which had been held in abeyance pending a final disposition in *Hatchett*, came on for hearing in the Court of Appeals, and presented, as a new and additional issue, the validity of the 1954 amendment to the Organic Act.

The Ninth Circuit reversed respondent's conviction and ordered the information dismissed (App., *infra*, pp. 1a-13a, 17a). After citing the *Pugh* and *Hatchett* cases, *supra*, the court stated that, had the subject case been heard when it was ready, "we would have held the District Court had no jurisdiction to prosecute and would have dismissed the indictment." (App., *infra*, p. 3a.) It then considered the 1954 Amendment to the Organic Act and held it to be invalid as an *ex post facto* law and, as applied to a conviction prior to the amendment, a bill of attainder. (App., *infra*, pp. 3a-13a.) The specially concurring opinion, while declining to pass on whether the amendment was ex post facto, deemed it invalid as applied to a prior conviction either as a legislative intrusion into the judicial sphere or as a bill of attainder. (App., *infra*, pp. 13a-17a.)

REASONS FOR GRANTING THE WRIT

The decision below creates grave practical problems in the enforcement of the criminal law in

Guam for all crimes committed between the enactment of the Organic Act in August 1950 and the passage of the remedial amendment of August 27, 1954. Not only does it automatically invalidate all felony convictions actually had in Guam during that period, in which indictment was not waived, but also, by declaring the amendment an *ex post facto* law, the ruling makes it impossible hereafter to try any felonies committed during that time except on indictment returned by a grand jury. Since Guam has had no grand jury system and since, in view of the 1954 Amendment, no measures have been taken to set up a grand jury system, the holding below amounts to a virtual immunity for crimes committed before August 27, 1954. The number of convictions involved is considerable—more than 60 cases involving over 70 defendants, including two murder cases and one of rape. At best, the decision below is very doubtful, and we believe it to be contrary to controlling decisions of this Court. And it is an Act of Congress which has been invalidated.[2] For these reasons, and because of the serious adverse effects it will have, both upon the administration of criminal justice in Guam and on the general power of Congress to enact curative legislation to correct procedural defects, the ruling should be reviewed by this Court.

1. The Ninth Circuit's initial holding that a person charged in Guam with a felony has a right to be prosecuted by indictment returned by a grand

[2] An Act of Congress having been invalidated, the United States would have a right of appeal to this Court under 28 U.S.C. 1252, if this were a civil action.

jury rests upon that court's prior decisions in *Pugh* v. *United States*, 212 F. 2d 761 (C. A. 9), and *Hatchett* v. *Guam*, 212 F. 2d 767 (C. A. 9). While those cases recognized that the constitutional right to a grand jury provided by the Fifth Amendment does not extend to the unincorporated [3] territory of Guam,[4] they did rule that Section 22 of the Organic Act of 1950, by making Rules 6 and 7 of the Federal Rules of Criminal Procedure applicable to criminal prosecutions in Guam, accorded a statutory right to an indictment to all persons charged with a felony.

This decision of the court below is at odds with the intent of Congress as manifested both in the language of the Organic Act and in its legislative history. Nowhere in Section 5 of the Act, its "bill of rights," [5] was any provision made for indictment

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[3] Section 3 of the Organic Act of 1950, 48 U.S.C. 1421a, *supra*, pp. 2-3.

[4] *Hawaii* v. *Mankichi*, 190 U.S. 197; *Dorr* v. *United States*, 195 U.S. 138; *Ocampo* v. *United States*, 234 U.S. 91; *Balzac* v. *Porto Rico*, 258 U.S. 298.

[5] Section 5 of the Organic Act of Guam, 48 U.S.C. 1421b, provides:

> (a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.
>
> (b) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.
>
> (c) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no

by a grand jury. The failure of Congress to include in this detailed enumeration of personal rights any provision either for indictment by grand jury or trial by petit jury was not the result of inad-

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warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

(d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

(e) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

(g) In all criminal prosecutions the accused shall have the right to a speedy and public trial; to be informed of the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(h) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(i) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in Guam.

(j) No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

(k) No person shall be imprisoned for debt.

(l) The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion or imminent danger thereof, the public safety shall require it.

(m) No qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter.

(n) No discrimination shall be made in Guam against

vertence but was a purposeful choice made after careful deliberation. The Committee on Interior and Insular Affairs of the Senate, in reporting H. R. 7273, 81st Cong., which became the Organic Act, stated (S. Rep. No. 2109, 81st Cong., 2d sess., p. 13):

> Section 5: Provides for a bill of rights granting the Guamanians protection against infringement of personal freedom. The bill of rights is modeled upon the Bill of Rights in the United States Constitution but does not expressly provide for trial by jury in Guam.

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any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.

(o) No person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(p) No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

(q) The employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

(r) There shall be compulsory education for all children, between the ages of six and sixteen years.

(s) No religious test shall ever be required as a qualification to any office or public trust under the government of Guam.

(t) No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of Guam or of the United States shall be qualified to hold any public office of trust or profit under the government of Guam.

> Since Guamanians derive their tradition in law from Spain, a civil-law nation, they have little knowledge or experience in trial by jury. The Guam Congress could institute trial by jury if it so desired.

The care with which Congress spelled out the specific rights which Guamanians were to possess for the protection of their personal freedom brings the omission of any provision for a jury system squarely within the rule of *expressio unius, exclusio alterius.*

By a needlessly technical and too literal reading of Section 22 of the Organic Act to provide that every single one of the Federal Rules of Criminal Procedure should apply without modification to Guam, the court below defeated the purpose of Congress. Faced with a similar problem of reconciling the literal language with the purpose of the Newlands Resolution, 30 Stat. 750, of July 7, 1898, by which Congress annexed the Hawaiian Islands to the United States as of August 12, 1898, this Court, in *Hawaii* v. *Mankichi,* 190 U. S. 197, ruled that the plain intention of the lawmaking power should control. In the Newlands Resolution, Congress had provided that "the municipal legislation of the Hawaiian Islands * * * [not] contrary to the Constitution of the United States * * * shall remain in force until the Congress of the United States shall otherwise determine." Between August 12, 1898, and June 14, 1900 (when the Territory of Hawaii was formally established under

Congressional act), Mankichi was charged by an indictment not returned by a grand jury with manslaughter and convicted on a verdict of nine out of twelve jurors, all in accord with the municipal law. He petitioned for habeas corpus to obtain his release on the ground that the Newlands Resolution extended to him the right to indictment by grand jury and conviction on a unanimous verdict of the petit jury as provided by Amendments 5 and 6 of the United States Constitution. The Court, dealing with a problem no less difficult than that presented here by the Organic Act of Guam, readily resolved the issue in accordance with the manifest intent of Congress.

In the *Mankichi* decision, the Court took cognizance of the history and conditions of the Hawaiian Islands prior to their annexation. This guide to interpretation is equally applicable here. Nowhere in the Organic Act is any provision made for extending 28 U. S. C. 1861-1874, relating to the qualification and manner of selecting jurors, to the District Court of Guam, and Guam has no laws of its own pertaining to jurors. When the similar situation in Hawaii was brought to the Court's attention in *Mankichi,* it said (190 U. S. at p. 215):

> * * * but where the application of a procedure hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress.

> In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

So, here, the court below should have construed Section 22 of the Organic Act, in the light of the historical background of Guam and the evident Congressional intent apparent from the Act as a whole, not to require indictment by grand jury.

2. Moreover, whatever may be the effect of what was at most a Congressional oversight in the original enactment of Section 22 of the Organic Act, the court below was in error in holding that Congress had no power retroactively to cure that legislative oversight.[6] As the court recognized, the right to indictment returned by a grand jury is not a right constitutionally guaranteed in Guam (*Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298); and if such a right was granted in 1950 by statute, it was not a clear mandate nor the fruit of specific deliberation. Congress could, we submit, withdraw retroactively such a doubtful statutory right which it had previously granted, if at all, through inadvertence or without appreciation of the consequences.

While it is clear that the *ex post facto* prohibi-

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[6] The petition for certiorari in the *Hatchett* case was withdrawn by the Government of Guam, apparently on the assumption that there was no need to bring the problem to this Court in view of the amendatory legislation.

tion of the Constitution (Article I, Sec. 9) limits the power of Congress when it is legislating for unincorporated territories,[7] it does not follow that a retrospective change in criminal procedure as regards indictments is *ex post facto*. The general standard to be applied is whether the law takes away a "substantial right." *Kring* v. *Missouri*, 107 U. S. 221; *Beazell* v. *Ohio*, 269 U. S. 167. It is settled that retroactive legislation which makes an act, innocent when done, a crime, or adds to the penalty for a crime after its commission, is forbidden under that test (*Calder* v. *Bull*, 3 Dall. 386, 390), but no such clarity surrounds retroactive changes in procedure. Justice Stone, after summarizing the law on the *ex post facto* clauses in the *Beazell* case, wrote for the Court (269 U. S. at p.171):

> Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy* v. *South Carolina*, 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. See *Gibson* v. *Mississippi*, 162 U. S. 565, 590; *Thompson* v. *Mis-*

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[7] *Scott* v. *Sandford*, 19 How. 393, 614; *Dorr* v. *United States*, 195 U.S. 138.

souri, 171 U. S. 380, 386; *Mallett* v. *North Carolina,* 181 U. S. 589, 597.

These terms—"substantial right" secure from "arbitrary and oppressive legislation"—are obviously not words of fixed content, but in the context of the constitutional prohibitions against *ex post facto* laws they may be said to import a conception akin to due process. The right to indictment by grand jury as guaranteed by the Fifth Amendment is not so substantial that it follows the flag to unincorporated territories. *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298. Nor is it such a substantial element of due process that a state may not abolish it. *Hurtado* v. *California,* 110 U. S. 516.

And since the *ex post facto* clause of Article I, Section 10 of the Constitution, limiting the states, has never been given a different meaning from the comparable clause of Section 9, limiting Congress, the state decisions which have considered retroactive abolition of indictments are persuasive authority. Though there is a conflict in the state cases upon the question of whether a statute permitting prosecution by information is *ex post facto* when applied to offenses committed at a time when the law provided for prosecution by indictment, the trend of opinion supports the view that such a statute is not outlawed.[8] The only cases holding

[8] Note: 53 A.L.R. 716, *People* v. *Campbell,* 59 Cal. 243, 43 Am. Rep. 257; *In re Wright,* 3 Wyo. 478, 27 Pac. 565; *Lybarger* v. *State,* 2 Wash. 552, 27 Pac. 449; *State* v. *Hoyt,* 4 Wash. 818, 30 Pac. 1060; *State* v. *Kyle,* 166 Mo. 287, 65 S.W. 763; *State* v. *Parks,* 165 Mo. 496, 65 S.W. 1132.

a change in the procedure of instituting a prosecution to be *ex post facto* involved crimes committed in the incorporated territories, to which the constitutional protection of the Fifth Amendment (including the grand jury provision) extended at the time. *State* v. *Rock,* 20 Utah 38, 57 Pac. 532; *State* v. *Kingsly,* 10 Mont. 537, 26 Pac. 1066; *Garnsey* v. *State,* 4 Okla. Cr. 547, 112 Pac. 24.[9] But not all states have held that retroactive legislation was *ex post facto* even though the Fifth Amendment did guarantee an indictment when the crime was committed. *Lybarger* v. *State,* 2 Wash. 552, *supra; State* v. *Hoyt,* 4 Wash. 818, *supra.* This general body of state court decisions becomes fully persuasive of the error below when it is remembered that the power possessed by Congress to legislate for Guam is properly equated with the power possessed by state legislators, and that the Fifth Amendment's grand jury provision has never applied to Guam.

The decisions holding *ex post facto* a retrospective change to authorize institution of criminal proceedings by information rely in large measure, as did the Court of Appeals in the instant case, on *Thompson* v. *Utah,* 170 U.S. 343. The Court there held that a retrospective application of a state law which provided for trials of felonies by a jury of eight to a felony committed

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[9] *McCarty* v. *State,* 1 Wash. 377, 25 Pac. 299, and *People* v. *Tisdale,* 57 Cal. 104, avoided the *ex post facto* problem by ruling that the later statute authorizing the use of information was not intended to be retroactive.

while Utah was still a territory, subject to the Fifth Amendment guarantee of a trial by a jury of twelve, was invalid. Though the *Thompson* case may perhaps not be distinguished from this one on the ground that the former involved a petit jury and this a grand jury (cf. *Maxwell* v. *Dow*, 176 U.S. 581), it surely can be differentiated on the basis that the right retroactively revoked was a constitutional right in the territory of Utah and only a statutory right in the territory of Guam. Since prosecution by indictment was never a constitutional right in Guam, nor an ingredient of due process, the change worked by the 1954 Amendment to the Organic Act affects only a procedural matter—of doubtful application, at best—and not a "substantial right" within the meaning of the *ex post facto* prohibition.

3. The Court of Appeals also erred when it construed the 1954 Amendment, as applied to a trial before the amendment, to be a bill of attainder prohibited by Article I, Section 9 of the Constitution. Its reasoning rests upon the assumption that the District Court of Guam lacked jurisdiction to try a felony prosecution based upon an information (App., *infra*, p. 12a):

> Since in dismissing the information in the *Pugh* and *Hatchett* cases we have held the District Court of Guam to have no judicial power to have tried them, it is clear that the amendment's attempt to deny them any right to attack the judgments against them, is a bill

> of attainder. It would inflict imprisonment on them "without a judicial trial" and mark them as felons with subsequent denial of employment, etc.

While the court thus construed its decisions in *Pugh* v. *United States*, 212 F. 2d 761 (C.A. 9), and *Hatchett* v. *Guam*, 212 F. 2d 767 (C.A. 9), as deciding that the District Court lacked jurisdiction in the absence of an indictment, the language of the *Pugh* case, which was followed in *Hatchett*, disavowed such a holding. The court there stated (212 F. 2d at p. 764):

> * * * Since Congress carefully saw to it that Guam be not incorporated in the United States, and hence that the constitutional provisions relating to grand and petit juries did not extend there, there is no occasion for a holding that since indictment by grand jury and trial by petit jury were lacking here, the court was without jurisdiction for the same reason that a district court in continental United States would lack jurisdiction in such cases.
>
> The reference to the court having "the jurisdiction of a district court of the United States" does not stamp the failure to procure an indictment as a defect stemming from something akin to a constitutional requirement. The requirement of a grand jury is simply a statutory provision, brought about by § 22(b) [of the

> Organic Act] incorporating by reference criminal rule 7(a). * * *

As interpreted by this Court, the bill of attainder clause prohibits all legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Lovett,* 328 U.S. 303, 315. But since the District Court of Guam had jurisdiction over the subject matter of the offense for which respondent was tried and over his person, he was accorded a judicial trial. Even if respondent was entitled to indictment by a grand jury at the time prosecution was commenced, failure to proceed in that manner constituted simple error and did not result in loss of jurisdiction. See *Hawaii* v. *Mankichi,* 190 U.S. 197, 218, in which the Court stated:

> * * * but we place our decision of this case upon the ground that the two rights [to indictment and to a petit jury] alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.

Accordingly, there is a basic error in the premise of the Court below that failure to proceed by in-

dictment is a jurisdictional defect which prevented respondent's trial from being an exercise of judicial power.

The constitutional prohibitions against *ex post facto* laws and bills of attainder have never been construed to deny to Congress the power to enact retroactive legislation of a curative nature to overcome defects and oversights in an enactment, particularly when it is plainly not unjust to do so. Such curative legislation may affect pending litigation so long as it disturbs neither jurisdiction nor truly vested rights of substance. Cf. *Duncan* v. *Missouri*, 152 U.S. 377; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U.S. 505. This Court in *Freeborn* v. *Smith*, 2 Wall. 160, 174-5, stated:

> * * * It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.
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> * * * * *
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> * * * Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.

Because respondent has no real vested rights at stake and because the lack of an indictment is not

a jurisdictional defect in the unincorporated territory of Guam, there is no constitutional limitation on the authority of Congress to pass the 1954 Amendment to the Organic Act as curative legislation.

The suggestion made in the special concurring opinion of Judge Pope that the 1954 Amendment is invalid as a legislative intrusion on the judicial power rests on the same erroneous premise as the bill of attainder objection, *i.e.,* that the failure to proceed by indictment was not a curable procedural defect. The 1954 Amendment can no more be construed as a legislative attempt to lay down a "rule of decision", as was done in *United States* v. *Klein,* 13 Wall. 128, 147, than it can be construed as a legislative imposition of a penalty. In the *Klein* case, Congress asserted a power it never had when it attempted to wipe out the judicial effect of a Presidential pardon, but in this case it merely did at a later date what it had full constitutional power to do in the first instance, and may well have then attempted to do. Moreover, since, as Judge Pope recognized, Congress could have taken away appellate jurisdiction to review criminal cases arising in Guam, *Ex parte McCardle,* 7 Wall. 506, Section 3 of the 1954 Amendment may perhaps be interpreted as denying jurisdiction to the court to entertain the issue of the absence of an indictment.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MAY, 1955.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,778

Mar. 10, 1955

EDWARD D. PUTTY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of Guam, Territory of Guam

Before: DENMAN, Chief Judge and POPE, Circuit Judge and HAMLIN, District Judge

DENMAN, Chief Judge:

Putty appeals from a conviction for conspiracy and theft of federal property, based on an information filed by the prosecuting attorney. He urges as his grounds of appeal (A) that he was tried on an information filed by the prosecuting attorney and was not granted the consideration of an impartial grand jury, and that at the time of the commission of the charged acts and at the time of his trial, Rules 7 and 6 of the Rules of Criminal Procedure, made applicable by Congress to Guam, gave no power to its District Court to prosecute him except by indictment, unless waived—which it was not; (B) that the amendment of the Organic Act of Guam, enacted after Putty's commission of the charged acts, to make his conviction legal without an indictment is invalid as an ex post facto law; (C) that because the proceedings of his trial and conviction are void, the amendment is a bill of

attainder; and (D) that the information fails in two counts to state an offense and as to two other counts, the evidence fails to support the convictions.

(A) *Putty's conviction on January 27, 1953, based on an information, was then without the power of the Guam District Court.*

Section 1424 (b) of the Organic Act of Guam then provided, so far as pertinent, that

> "The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to . . . sections 3771 and 3772 of Title 18, in criminal cases; . . . shall apply to the District Court of Guam and to appeals therefrom. Aug. 1, 1950, c. 512, 22, 64 Stat. 389."

Rule 7 of the Code of Criminal Procedure required the prosecution of the crime charged against Putty to be initiated by indictment.[1] Rule 6 provided for a grand jury of not less than 16 nor more than 23 jurors.[2]

---

[1] "(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave or court."

[2] (a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

This court has held in two cases that Congress in making these rules applicable to the Territory of Guam, gave no power to its District Court to prosecute on a mere information one accused of a federal crime. In each the sentence was vacated and the information dismissed. One was a 28 U. S. C. 2255 proceeding, Pugh v. United States, 212 F. 2d 761. The other, as here, was a direct appeal from the conviction, Hatchett v. Guam, 212 F. 2d 767. These cases hold that while the constitutional provision for a grand jury does not apply to such a territory as Guam, Congress had created that right for the Territory in making applicable there the criminal rules.

Certiorari was sought in our Hatchett case and we delayed action in the instant Putty case, which then was ready for hearing. The petition for certiorari was withdrawn, after Congress on August 17, 1954, had amended the Organic Act in a manner hereafter considered.

It is thus apparent that if we had decided the Putty appeal when it was ready for hearing, we would have held the District Court had no jurisdiction to prosecute and would have dismissed the information.

(B) *The amendment of the Organic Act of the unincorporated Territory of Guam, purporting to create in its District Court jurisdiction in the Putty and other similar cases by retroactively denying the right to indictment existing at the time the crime was committed, is invalid as an ex post facto law.*

The Constitution specifically creates power in Congress to legislate for a territory in Article IV, Section 3, as follows:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

The Supreme Court holds the power to legislate for such unincorporated territories as the Philippine Islands rests on this Article IV, Section 3. Hoover and Allison Co. v. Evatt, 324 U. S. 652, 673.

Limiting all its legislative power over a territory, Congress is prohibited by Article I, Section 9, to enact an ex post facto law as follows: "No bill of attainder or ex post facto Law shall be passed."

In Dorr v. United States, 195 U. S. 138, the Supreme Court, after holding that the Philippines were not then an incorporated territory of the United States, states that in governing such a territory Congress is restricted by the Constitution from passing an ex post facto law, quoting Mr. Justice Curtis' statement in Dred Scott v. Sanford, 19 How. at page 614 that "If then, this clause [Art. IV, Sec. 3] does contain power to legislate, what are the limits of that power?"

"To this I answer that, in common with all the other legislation of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, *Congress cannot pass an ex post facto law or bill of attainder;* and so in respect to each of the other prohibitions contained in the Constitution." (Emphasis supplied.)

So also in Downes v. Bidwell, 182 U. S. 268, the court, in discussing the laws applicable to the un-

incorporated Territory of Porto Rico stated at pages 276 and 277:

> "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.
>
> "Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.*"

The statement regarding the limitation against ex post facto laws in unincorporated territories is repeated at page 292 in the concurring opinion of Mr. Justice White and at page 383 in the dissenting opinion of Mr. Justice Harlan.

The amendment of the Organic Act of Guam enacted August 27, 1954, provides:

"CHAPTER 1017—PUBLIC LAW 679

(H. R. 8634)

"An Act to amend section 22 of the Organic Act of Guam

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

"Subsection (b) of section 22 of the Organic Act of Guam (64 Stat. 389), is amended by striking out the period at the end of such subsection and inserting in lieu thereof the following: "; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, and except further that the terms 'attorney for the government' and 'United States attorney', as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein."

"Sec. 2. The amendment made by section 1 shall be deemed to be in effect as of August 1, 1950.

"Sec. 3. No conviction of a defendant in a criminal proceeding in the District Court of Guam heretofore had shall be reversed or set aside on the ground that the defendant was not indicted by a grand jury or tried by a petit jury."

This attempt by Congress to confer jurisdiction on the Guam District Court where it did not exist at the time of the commission of the crime is the deprivation of a substantial right of persons convicted of felonies in that court and not a mere minor matter. The vital contrast is clear between

the proceeding on the information of the single prosecuting attorney and on the deliberate and detached judgment of at least 18 grand jurors in whose action at least 12 must concur.

In Kring v. Missouri, 107 U. S. 221, where the court was discussing what procedural rights are sufficiently substantial not to be taken away by ex post facto laws, it stated at page 232 that the right to indictment by a grand jury was one of them, as follows:

> "Can the law with regard to bail, *to indictments, to grand juries,* to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offence was committed, and such legislation not held to be ex post facto *because it relates to procedure,* as it does according to Mr. Bishop?
>
> "And can any *substantial right* which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because, in the use of a modern phrase, it is called a *law of procedure?* We think it cannot." (Emphasis supplied.)

In Beazell v. Ohio, 269 U. S. 167, in discussing those procedural changes which are so substantial that they cannot be affected by an ex post facto law, the court, referring to Kring v. Missouri, states at page 170:

> "And there may be *procedural changes* which operate to deny to the accused *a defense available under the laws in force at the time of the commission of his offense,* or which otherwise affect him in such a harsh and arbitrary man-

ner as to fall within the constitutional prohibition. Kring v. Missouri, 107 U. S. 221; Thompson v. Utah, 170 U. S. 343." (Emphasis supplied.)

The situation now in Guam is the same is it was in the unincorporated Territory of Porto Rico. There the fundamental constitutional rights did not apply but, as here, Congress created for an accused person, the procedural right to indictment by grand jury "in the same manner as a Circuit Court of the United States". Certain grand jurors were disqualified and the Supreme Court, in Crowley v. United States, 194 U. S. 461, held the indictment "vitiated". In reversing it stated at page 474 that, where in a territory a Congressional statute requires qualified grand jurors and some are not, it "cannot be regarded as a mere defect or imperfection in form; *it is a matter of substance which cannot be disregarded without prejudice to the accused*". A fortiori the entire absence of a grand jury is a substantial prejudice against Putty.

It was further contended in this Crowley case that though it was not proper procedure for the trial court to act without indictment "the indictment in question being signed by the United States Attorney can be treated as an information". The court draws the obvious distinction between the function of the grand jury and that of the prosecuting attorney and held that

> ". . . the positive command of the act of Congress relating to the District Court of the United States for Porto Rico, that the court below 'shall proceed in the same manner as a

Circuit Court' of the United States, precluded the prosecution of the accused in the latter court except by presentment or indictment."

In Thompson v. The State of Utah, 170 U. S. 343 the court had under consideration a statute of Utah when a territory which provided that the procedure for the trial of felonies should be by a jury of 12 persons. Thompson committed the felony of stealing a calf and was tried under the applicable territorial statute by a jury of 12. A new trial was granted and thereafter Utah became a state. The state constitution provided for a jury of eight persons to try such a felony. Thompson was tried by a jury of eight and convicted. He contended that the state statute authorizing the trial procedure to be by eight jurors was an ex post facto law by which he was deprived of a substantial right.

In reversing the Supreme Court held that the statute was an ex post facto law because it deprived Thompson of a substantial right for a trial procedure with 12 jurors. The court considered the distinction between substantial and other rights and stated of the right so to be tried that it "belongs to that class which by its necessary operation and 'in relation to the offense, or its consequences, alters the situation of the accused to his disadvantage' ". What the Supreme Court says of the substantiality of the right of trial jury procedure of which cannot be deprived by an ex post facto law is equally applicable to grand jury procedure.

The distinction between substantial rights and those not substantial is discussed in the following cases. In Mallet v. North Carolina, 181 U. S. 589, 597, the court held that the change in the appellate

court to which the convicted men could appeal was not an ex post facto law, inter alia because it "did not deprive the accused of any *substantial right or immunity* possesed by them at the time of the commission of the offence charged." (Emphasis supplied.) This statement was repeated in Malloy v. South Carolina, 237 U. S. 180, 184, where it was held that the change in the form of execution from hanging to the more merciful electrocution was not an ex post facto law because so ameliorating the punishment did not deprive him of a "substantial right." So also in Rooney v. North Carolina, 196 U. S. 319, where a subsequent statute of 1903, increasing the time of imprisonment before execution, was held not an ex post facto law, since it gave the condemned additional time to seek a parole or commutation of sentence. None of these cases question the decisions of Thompson v. Utah, Kring v. Missouri and Beazell v. Ohio, cited above.

In Hallock v. United States, 185 Fed. 417 (Cir. 8) the Court of Appeals, with a strong dissent by District Judge Sanborn, held that the mere change in the total number of grand jurors from 16 to 19, is not an ex post facto law because such a change is not of a substantial character. This case has no bearing on the attempt ex post facto to make valid a conviction, where the right to indictment by a grand jury, existing when the crime was committed, is taken from the accused.

(C) *The amendment is a bill of attainder since it seeks to impose the penalty of imprisonment on a well defined group of persons, without any judicial trial by a court authorized to try them.*

The report of the Senate, No. 2006, states that the purpose of the above amendment is to provide that those persons in Guam who "have been proceeded against by way of information rather than by indictment . . . cannot use such fact for attack on their convictions by appeal or collaterally," under 28 U. S. C. 2255.

The Supreme Court in Cummings v. Missouri, 4 Wall. 277, at page 323 defines a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."

In the Cummings case, Missouri had enacted a statute under which Father Cummings was indicted, convicted, and fined for preaching and teaching as a priest without taking an oath required by the statute.[3]

That the Cummings case is still law is held in United States v. Lovett, 328 U. S. 202. There the court held to be a bill of attainder an act of Congress, § 304 of the Urgent Deficiency Appropriations Act of 1943, prohibiting the payment of salaries to certain government officials and prohibit-

[3] The court, at page 316 describes the oath as one denying "not only that he has ever 'been in armed hostility to the United States, or to the lawful authorities thereof', but, among other things, that he has ever, 'by act or word', manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in rebellion, or has ever harbored or aided any person engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever entered or left the State for the purpose of avoiding enrolment or draft in the military service of the United States; or to escape the performance of duty in the militia of the United States, has ever indicated, in any terms, his disaffection to the government of the United States in its contest with the Rebellion."

ing them from continuing in the government employment.

In so holding the court stated that neither the Cummings case nor the similar case of ex parte Garland, 4 Wall. 333 "has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of § 304. We do adhere to it."

Since in dismissing the information in the Pugh and Hatchett cases we have held the District Court of Guam to have no judicial power to have tried them, it is clear that the amendment's attempt to deny them any right to attack the judgments against them, is a bill of attainder. It would inflict imprisonment on them "without a judicial trial" and mark them as felons with subsequent denial of employment, etc.

We are not impressed with the contention urged in the Congressional Committee report that if the ex post facto provisions of the Amendment to the Guam Organic Act is not applied, a number of convicted men will be released from prison. A wrong done one person does not become rightful because it is done to several.

(D) *We are required to give consideration to the ex post facto and bill of attainder contentions, since the court found Putty guilty of two crimes on an information sufficiently charging the two offenses and is not a mere nullity.*

If the information had presented no adequate charge of a crime and, as a complete nullity presented nothing for the court's consideration this appeal should be decided on that ground and the determination of the constitutional questions avoided. Alma Motor Co. v. Timken Co., 329 U. S. 129. Putty's brief does not question that charges II and IV are sufficiently alleged and contends only that the evidence does not support the findings of guilt. We think the evidence does support the findings and hence are required to consider the question whether the court had jurisdiction to entertain Putty's prosecution.

Since the above holdings sufficiently establish that the conviction of Putty must be reversed, it is not necessary to consider other contentions of the parties.

The judgment is reversed and the information ordered dismissed.

POPE, Circuit Judge, concurring specially.

I agree that the judgment must be reversed and the information ordered dismissed. Of course Congress might have withdrawn from this Court all jurisdiction to entertain the appeal here, Ex Parte McCardle, 7 Wall. 506; National Exchange Bank v. Peters, 144 U.S. 570, but §3 of the Act of August 27, 1954, quoted in Judge Denman's opinion, does not purport to do that. This Court still has jurisdiction to hear the appeal but under §3 it cannot set aside the conviction on the ground there named;—we may hear the appeal but we may not reverse on the ground that defendant was not indicted by grand jury.

I agree that that provision is invalid either because Congress has "passed the limit which separates the legislative from the judicial power", under the rule of United States v. Kline, 13 Wall. 128, 147, or because, since the enactment operates to inflict punishment, it must be held to be a bill of attainder. I agree that the constitutional prohibition in Article I, §9, Clause 3, relating to bills of attainder and ex post facto laws extends to the acts of Congress relating to the Island of Guam.

I do not express any opinion with respect to that part of Judge Denman's opinion in which he concludes that the amendment of the Organic Act of Guam is invalid as an ex post facto law. If hereafter Putty or some other person charged with the commission of an offense prior to the date of the amendatory enactment is prosecuted under the Amendatory Act it will be time enough to decide that question. It is a question not without difficulty but it is one upon which the Supreme Court has never expressed any opinion. Kring v. Missouri, 107 U. S. 221, upon which Judge Denman's opinion seems to lean most heavily, was a very different case upon its facts for there a perfect defense to the crime of murder in the first degree which existed at the time of the commission of the crime was taken away by the new law. In the course of its opinion the Supreme Court alluded to the proposition that the distinction between laws which are ex post facto and those which are not is not to be found at the line between substantive and adjective law and that retroactive laws may not escape the constitutional condemnation merely because they regulate procedure. The court re-

ferred to what is generally regarded as the best definition of an ex post facto law, that given by Mr. Justice Washington in his charge to the jury in United States v. Hall, 2 Wash. 366. It said: "We are of opinion that any law passed after the commission of an offense which, in the language of Mr. Justice Washington, in United States v. Hall, 'in relation to that offence, or its consequences, alters the situation of a party to his disadvantage,' is an ex post facto law."[1]

The Supreme Court was merely stating what has never been questioned, namely, that the retroactive operation of a law may be ex post facto even although it is in terms and in substance a law regulating procedure. What the Supreme Court said in the Kring case was that the test to be applied is whether a *substantial* right has been taken away,—the distinction lies in the difference between "substantial" and "unsubstantial" rights.

If and when it becomes necessary to pass upon that question it will be incumbent upon us to determine whether the previous right of a person in Guam to demand that prosecution should be upon a presentment or indictment of a grand jury is of such character that the substitution of prosecution by information operates, if applied retroactively, to deprive the accused of a substantial right within the meaning of the ex post facto clause

---

[1] ". . . an ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage." United States v. Hall, 2 Wash. 366.

as expanded in the decisions of the Supreme Court. For the determination of that question Kring v. Missouri furnishes no help. Some decisions of the Supreme Court furnish illustrations of instances in which the retroactive application of laws prescribing new procedures in criminal prosecutions have been held not violative of this clause.[2] Some retroactive changes in procedure have been stricken down as ex post facto laws.[3] But the effect of the retroactive change from prosecution by indictment to prosecution by information is something upon which the decisions of the Supreme Court furnish no light.

The Supreme Courts of a number of States have discussed this precise question with much learning and ability and have arrived at opposite conclusions. Among the cases upholding these retroactive enactments as not violative of the ex post facto prohibition are: Lybarger v. State, 2 Wash. 552, 27 Pac. 449, (1891); In Re Wright, 3 Wyo. 478, 27 Pac. 565, (1891); People v. Campbell, 59 Cal. 243, (1881). To the contrary are: State v. Ingsley, 10 Mont. 537, 26 Pac. 1066, (1891); Garnsey v. State, 4 Okl. Cr. 547, 112 Pac. 24, (1910); State v. Rock, 20 Utah 38, 57 Pac. 532, (1899).

Since decision of this question is not necessary

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[2] Beazell v. Ohio, 269 U. S. 167; Gibson v. Mississippi, 162 U. S. 565; Hopt v. Utah, 110 U. S. 574, Thompson v. Missouri, 171 U. S. 380; Mallett v. North Carolina, 181 U. S. 589; (this last case is difficult to reconcile on the facts with Kring v. Missouri, supra), Duncan v. Missouri, 152 U. S. 377; Gut v. State, 9 Wall. 35.

[3] Thompson v. Utah, 171 U. S. 380; American Publishing Co. v. Fisher, 166 U. S. 464.

in the disposition of this case, I prefer to abide by the rule of most courts: never decide today what can be put off until tomorrow.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 10, 1955. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13,778.

EDWARD D. PUTTY, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

Appeal from the District Court of Guam, Territory of Guam.

This cause came on to be heard on the Transcript of Record from the District Court of Guam, Territory of Guam, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, and the information ordered dismissed.

(ENDORSED) Judgment, Filed and entered: March 10, 1955, PAUL P. O'BRIEN, CLERK.

SUPREME COURT OF THE
UNITED STATES

No. —. October Term, 1954

EDWARD D. PUTTY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9, 1955.

(sgd) W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 8th day of April, 1955.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 65

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD D. PUTTY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No.

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD D. PUTTY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Edward D. Putty, respondent herein, prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on March 10, 1955, be denied.

OPINIONS BELOW.

The opinions below have been correctly set out in the petition for writ of certiorari.

QUESTIONS PRESENTED.

1. Whether or not this case is moot, since the mandate has been executed, the bond exonerated, the conviction quashed, the information dismissed, and the statute of limitations has run.

2. If the answer to the foregoing question is in the negative, whether the Organic Act of Guam, Sec. 1424 (G), Title 48 USC, as enacted in 1950, clearly and without ambiguity, provided that indictment in the absence of waiver was mandatory in all prosecutions in the District Court of Guam.

3. If the answer to question two is in the affirmative, did not the Congress of the United States lack the power to retrospectively amend the Organic Act of Guam, and was not the Act of August 27, 1954 void

   a. As an ex post facto enactment in seeking to deny the right to indictment for crimes allegedly committed prior to August 27, 1954

   b. As a bill of attainder in seeking to prevent reversal of convictions heretofore erroneously entered in the District Court of Guam

   c. As a withdrawal of substantial rights, once granted, which cannot be taken away

   d. As a prohibitive infringement on the power of the Supreme Court of the United States?

STATUTES AND RULES INVOLVED.

Constitution of the United States

Article I, Section 9:

"No bill of attainder or ex post facto law shall be passed."

Article III, Section 1:

"The judicial powers of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Organic Act of Guam, Sec. 1424 (G), Title 48 USC 1950, Section 22 a:

"There is hereby created a court of record to be designated the 'District Court of Guam', and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. *The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code,* and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam." (Italics supplied.)

Federal Rules of Criminal Procedure

Rule 54. 1. (a)

"These rules apply to all criminal proceedings in the United States district courts, which include the District Court for the Territory of Alaska, and the District Court of the Virgin Islands; In the United States courts of appeals, and in the Supreme Court of the United States. . . .

1 (c)

As used in these rules the term 'State' includes District of Columbia, territory and insular possession. 'Law' includes statutes and judicial decisions. 'Act of Congress' includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or an insular possession. . . ."

(Other pertinent statutes and rules have been set out in the Petition for Writ of Certiorari.)

SUMMARY OF ARGUMENT.

Respondent contends that the petition for writ of certiorari in this matter should not be granted for the following reasons:

1. The question is moot, as the granting of such a petition can have no effect on the respondent, as the mandate has been executed, the bond exonerated, the information dismissed and respondent released.

2. The Organic Act of Guam (1950) clearly provided for indictment by grand jury and trial by petit jury, both in clear language, and expressed intent.

3. The amendment to said Organic Act was unconstitutional, and beyond the power of the Congress to enact, in that it

a. Was a violation of the limitation on Congress to enact ex post facto laws as prohibited by Article I, Section 9, Clause 3 of the Constitution.

b. Was a violation of the limitation on Congress to enact bills of attainder as prohibited by Article I, Section 9, Clause 3 of the Constitution.

c. Was an attempted withdrawal of substantial rights to American citizens which once given have never and cannot be taken away.

d. Was a prohibitive infringement on the powers of the Supreme Court of the United States in violation of Article I, Section 8, Clause 9 and Article III, Section I, of the Constitution.

ARGUMENT.

I. THE CASE IS MOOT.

The present case is actually moot and to decide the matter is to violate a fundamental principle of our judicial system. In a rule often proclaimed by this Court for which no citations are necessary, moot questions will not be decided and advisory opinions are not given. On April 14, 1955, an order was entered in the District Court of Guam (Appendix page 1) executing the mandate of the Court of Appeals for the Ninth Circuit and dismissing the infor-

mation. Subsequently, the bond of respondent was exonorated and he has departed from the Island of Guam. The statute of limitations for the offense has expired. There is nothing pending in any Court other than the academic question, Was the Court of Appeals right? Respondent contends that in accordance with well-established principles of law a decision on this point should be made not in a moot case such as this but in one which is actually before the Courts.

Petitioner has made the further contention that this is a matter of grave concern to the administration of justice on the Island of Guam . . . that some 60 cases and 70 defendants are affected. The records of the District Court of Guam indicate otherwise. As set out in the Appendix 2, some 48 persons were involved as of June 30, 1954 . Only a few more have been tried since the decisions in *Pugh v. U. S.,* 212 Fed. 2d 761 and *Hatchett v. Guam,* 212 Fed. 2d 767. Petitions for writs of certiorari were filed in both of those cases. A decision could have been rendered by the Supreme Court of the United States on the issues at that time. Instead the Government elected to withdraw its petitions and stand on the Saylor bill. (Public Law 769 83rd Congress.) This, in spite of the fact that expressed doubts as to the validity of retrospective sections were raised by the Department of Justice itself in the Senate Report construing the bill at the time of its passage. (Senate Report 2006, pages 6034-6035, letter of William P. Rogers, Deputy Attorney General, Appendix 3

hereof.) Can a situation of its own making now be cited by petitioner as a valid reason for seeking this writ?

As a matter of actual fact as of July 1, 1955, only 13 persons were still serving sentences after felony conviction by the District Court of Guam. All of the others have been paroled, placed on probation, served their sentence, or had sentence vacated. In addition, it should be noted that almost one-fourth of all of the Guam prisoners were Filippino aliens subject under the immigration laws to immediate deportation the very instant their sentence ended. A prior termination by reason of the invalidity of their conviction can only have the result of immediate return to their native land, with all the costs of long continued incarceration being saved by the Government. With over 70,000 people on Guam, it is indeed difficult to perceive how a matter affecting 13 prisoners and those few others who may have committed crimes as yet unknown, can have "serious adverse effects . . . on the administration of criminal justice in Guam". The matter is not only moot, but any consequences which may arise are as a result of the Government's own action or lack thereof.

II. THE ORGANIC ACT OF GUAM (1950) CLEARLY REQUIRED INDICTMENT BY GRAND JURY FOR FELONIES.

The question as to whether the Organic Act of Guam is clear with respect to indictment by grand jury, and trial by petit jury, is best resolved by read-

ing the text of the statute itself. It might initially be pointed out that the Solicitor General of the United States, in his petition, failed, in citing what was purportedly all of the statutes involved, to set out Section 22 (a) of the Organic Act, even though that section was of prime consideration to the Court of Appeals for the Ninth Circuit in all three of the cases herein involved. That section creates the Guam Court, and then provides:

> ". . . The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code . . ."

The problem of the jurisdiction of a District Court of the United States has been discussed in numerous cases. Such Courts are required to follow the Federal Rules of Criminal Procedure, as was the District Court of Guam. Failure to grant to a defendant those rights which he has as a result of constitutional or statutory enactment, results in a loss of jurisdiction by the Court. Failure to indict has been clearly held to deprive a District Court of such jurisdiction (*U. S. v. Petit,* 114 U.S. 417; *Ex parte Bain,* 121 U.S. 1), as has failure to complete the jury (*Johnson v. Zerbst,* 304 U.S. 458), and judgment of conviction without jury verdict of guilty (*Callan v. Wilson,* 127 U.S. 540).

Clearly, the Congress has conferred upon the District Court of Guam the same jurisdiction, and jurisdictional requirements, as all other District Courts of

the United States. One of such bases of jurisdiction is a grand jury indictment. Respondent does not see how the plain language of the statute, which has no ambiguity, can be construed otherwise.

An additional express declaration of the Congress that such indictment by grand jury is a requisite of felony hearings on Guam, was the clear language of Section 22(b) of the Organic Act:

> "The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to . . . sections 3771 and 3772 of title 18 United States Code, in criminal cases . . . shall apply to the District Court of Guam and to appeals therefrom."

A primary canon of statutory construction requires that statutes or rules incorporated by reference be construed as if set out in full where incorporated. Clearly, then, each and every one of the Federal Rules of Criminal Procedure, adopted by the Supreme Court pursuant to the aforesaid sections of Title 18, USC, must be said to apply to Guam. These include Rule 7(a), which requires indictment in felony cases, in the absence of waiver.

It might also be pointed out that the Federal Rules themselves, in Rule 54, provide that they shall apply to territories and insular possessions of the United States. This point was merely re-emphasized by the Organic Act of Guam in Section 22 (b) supra.

If it were necessary to delve further into intent, the very reasons given for establishing a District Court on Guam suggests that Congress intended all

the procedural safeguards applicable in United States District Courts to be applicable to the District Court of Guam. In the original draft of the Organic Act (see H.R. 7273 81st Congress, 2nd Session as introduced on Februarv 13, 1950), no provision was made for a District Court. Enforcement of the laws of the United States was taken care of in Section 24 of the proposed bill by extending the jurisdiction of the United States District Court for the Northern District of California to include Guam and providing for special terms of that Court to be held in Guam. Clearly in that Court the respondent herein would have been entitled to prosecution by indictment and trial by jury. Later the bill was amended to establish a District Court in Guam. The reason for this change is given on page 4 of Senate Report 2109 with the following language: "The principal purpose of establishing a district court of Guam is to provide to American business in the Far East a court in which it can have 'the full protection of American laws and legal procedure' ". Clearly, the full protection of American laws and procedure would include the right to indictment by a grand jury in a felony matter and trial by petit jury and Congress has so provided.

Petitioner has sought to establish its position relative to congressional intent by reference to the Bill of Rights for Guam in which no provision was made for grand jury indictment and a statement was made that "the Guam Congress could institute trial by jury if it so desired". It is obvious, of course, that this

bill of rights referred specifically and only to the Guamanian territorial Courts. It could in no way have any bearing on the District Court of Guam, a Court with the jurisdiction of all other District Courts of the United States. The Guam Congress could not make provision for any of the procedures of said Court except when acting in its territorial capacity. Can it seriously be contended that the Congress of the United States intended to divest itself of power to make so basic a determination as the right to indictment and jury trial, in a District Court, judging American citizens, under Federal laws? This would be an amazing and unique grant of power. The Guam Legislature consists of 21 persons, all presently native to Guam, of varying educational backgrounds. They were given the right, under the Organic Act of Guam, to make the rules for their own territorial Courts, as is done by all other United States possessions, and by the legislatures of our 48 states. But neither the legislatures of Porto Rico, Hawaii, California or New York can interfere with the District Courts of their respective jurisdictions. Here we have a Federal Judge, appointed by the President, confirmed by the Congress, paid by the United States (who determines the application of the laws of the United States to the over 70,000 American citizens on Guam; who is a member of the Judicial Conference of the Ninth Circuit and sits equally with his fellow Federal Judges each year to determine policy and administrative matters for that circuit. Most assuredly, the language quoted as to the rights of the Guam Congress can have

no such meaning as contended by petitioner, when viewed in the light of the above facts, and the specific statement of the Congress, in the Organic Act Section 1424(a) to the effect that "The jurisdiction of and the procedure in the Courts of Guam *other than the District Court of Guam* shall be prescribed by the laws of Guam". (Emphasis supplied.)

III. THE AMENDMENT TO THE ORGANIC ACT OF GUAM, RETROACTIVELY DENYING THE RIGHT TO GRAND JURY INDICTMENT, IS VOID AS A VIOLATION OF THE EX POST FACTO PROVISIONS OF THE CONSTITUTION.

Petitioner does not question that Article I, Section 9, of the Constitution forbidding the passage of an ex post facto law is applicable to the Congress when legislating for the territory of Guam. It is contended, however, that prosecution by indictment was never a constitutional right in Guam, that it was not an ingredient of due process and therefore the amendment affects only a procedural matter and not a substantial right within the meaning of the ex post facto prohibition. (Petition p. 17.) It is submitted that this is an attempt by the petitioner to pull itself up by its bootstraps. The petitioner quotes Mr. Justice Stone in *Beazell v. Ohio,* 269 U.S. 167, to the effect that "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree". (Petition p. 14.) Petitioner then points out that the question is one as to

whether the defendant has been deprived of "substantial rights", but in the final analysis merely reiterates that because a matter of procedure is involved the right cannot be substantial. It is respectfully pointed out that in this instance the right is a very substantial one. The Court of Appeals for the Ninth Circuit has exhaustively discussed the controlling cases, including *Thompson v. Utah,* 170 U.S. 343, where the Court held ex post facto a retrospective change to authorize institution of criminal proceedings by information. An attempt to differentiate this case is made on the basis that a constitutional right was involved in the Territory of Utah and a statutory right in the Territory of Guam. Such an attempt is not supported by authority, for the cases are not concerned with the "source" of a substantial right. The problem is simply and concisely set out by Mr. Justice Washington in *U. S. v. Hall,* 2 Wash. 366, to the effect that any law passed after the commission of an offense which in relation to that offense or its consequences alters the situation of a party to his disadvantage is an ex post facto law. Most assuredly if this matter were not moot as to respondent, he would be substantially injured and there would be tremendous disadvantages to him by a ruling that he could not under the retrospective amendment to the Organic Act be tried on an information when previously he was entitled to a grand jury charge.

There is a conflict in the state cases as to whether a statute permitting prosecution by information is

ex post facto when applied to offenses committed at a time when the law provided for prosecution by indictment. Petitioner contends that the line of cases supporting his position is controlling on the theory "that the power possessed by Congress to legislate for Guam is properly equated with the power possessed by state legislators, and that the fifth amendment's grand jury provision has never applied to Guam". It should be pointed out that the power to legislate for the territories arises specifically as a result of Article IV, Section 3, of the Constitution. Respondent fails to see how this is to be "equated" with the power possessed by state legislators. The matter of the fifth amendment's grand jury provision applying to Guam has not as yet been decided by the Supreme Court. It is interesting to note that the decisions in the Insular cases, starting with *Balzac v. Porto Rico,* 258 U.S. 298, have in each instance referred to minor courts. In *Balzac,* the question of jury trial was in reference to a local territorial court of Porto Rico. In *Hawaii v. Mankichi,* 190 U.S. 197, a local Hawaiian court was concerned. In *Dorr v. The United States,* 195 U.S. 138 the case arose from the City Court of Manila as it did in *Ocampo v. United States,* 234 U.S. 91. This is actually the first instance in which the question has arisen as to whether Congress can create a federal district court with the full jurisdiction of District Courts of the United States free from the requirements of the fifth and sixth amendments. In a proper case a determination of that matter must be made. The petitioner, how-

ever, in *Pugh v. The United States* and its companion, The Government of Guam in *Hatchett v. Guam* saw fit to withdraw its petition for writs of certiorari wherein such a determination could have been made. Can petitioner now cite such a holding as authority for its position that no substantial right is involved?

It is submitted that this case is certainly not to be compared with those where a change in the type of execution or the place of imprisonment is concerned, and that the decisions in *Thompson v. Utah, supra, Kring v. Missouri,* 107 U.S. 221, and *Beazell v. Ohio,* 269 U.S. 167, are controlling.

IV. THE AMENDMENT TO THE ORGANIC ACT, RETROACTIVELY VALIDATING A CRIMINAL CONVICTION ON GUAM WITHOUT INDICTMENT IS INVALID AS A BILL OF ATTAINDER.

The Court of Appeals for the Ninth Circuit has previously held in *Pugh v. United States* and *Hatchett v. Guam, supra* (Petitions for certiorari withdrawn by governments concerned) that the right to grand jury indictment for felony offenses existed on the Island of Guam under the Organic Act of Guam 1950. Respondent herein was convicted of a felony violation and his conviction reversed on the basis of those prior holdings. The District Court of Guam was without power to conduct any proceedings as to the respondent without an indictment. Its actions in holding a hearing contrary to the statute were null and void, and without any effect whatsoever. The

Congress in passing the amendment to the Organic Act of Guam was attempting to ratify and confirm a void and nugatory proceeding which was, as to the respondent, a bill of attainder beyond the power and authority of the Congress.

The rules laid down in *Cummings v. Missouri*, 18 Law. Ed. 356, and as approved in *United States v. Lovett*, 328 U.S. 303, clearly define a bill of attainder as a legislative act which inflicts punishment without a judicial trial. The report of the Senate (No. 2006) on this amendment states that the purpose of the enactment is to provide that those persons in Guam who "have been proceeded against by way of information rather than by indictment . . . cannot use such fact for attack on their convictions by appeal or collaterally under 28 U.S.C. 2255". The Act of necessity could have referred only to specifically well-defined persons who had been tried and convicted without indictment by the District Court of Guam. Respondent herein is one of those persons. Petitioner has referred in its brief at pages 18 and 19 to a purported distinction in language between the *Pugh* and *Hatchett* cases, *supra*, and the instant case, with reference to the question of jurisdiction. As pointed out in our brief, section 2 above, the Guam District Court was given the same jurisdiction as other district courts of the United States. Numerous authorities have held that the jurisdiction of such a court is lost at the beginning or in the course of proceedings by failure to indict. Whether or not the word "jurisdiction" is used, all of the decisions are unanimous

in finding that there is no "judicial power" in the District Court of Guam to proceed without a grand jury indictment. Having no such right, a trial was not held and any allegation that this was a matter of mere procedure is without authority. This case is squarely within the rule of the *Cummings* and *Lovett* cases. The amendment was instigated purely and simply as a result of the decisions in the *Pugh* and *Hatchett* cases. There are only three other cases on appeal involving the same lack of indictment. (Appendix 2.) Respondent was a defendant in one of those cases. Without the amendment, he was free. With it (and assuming the case is not moot as to him), respondent would be subject to six years imprisonment. Can any clearer case of punishment by legislative fiat be imagined?

V. THE CONGRESS HAS NO POWER TO WITHDRAW THE RIGHT TO TRIAL BY JURY AND GRAND JURY INDICTMENT ONCE SUCH RIGHTS ARE GRANTED.

Respondent contends that substantial rights basic to our Anglo-Saxon system of jurisprudence cannot be withdrawn once they have been granted to citizens of the United States. The amendment herein is an attempt to destroy in 1954 a right which had existed to the respondent since 1950, which had been asserted by respondent in 1953 and which prior to the amendment had been affirmed by a court of appeals of the United States as existing and being possessed by the respondent.

Clearly the ancient principle, never doubted in district courts of the United States heretofore, that an accused in a felony case has the right to insist that he shall not be brought to trial unless accused by a grand jury composed of his peers, is a right of great substance. Respondent is unable to find one single instance in the history of our country where such a right once given had been taken away.

VI. THE AMENDMENT TO THE ORGANIC ACT WAS INVALID AS A PROHIBITIVE INFRINGEMENT ON THE POWER OF THE SUPREME COURT UNDER ARTICLE I, SECTION 8, CLAUSE 9 AND ARTICLE III, SECTION 1, OF THE CONSTITUTION.

A. Initially, it should be pointed out that we are concerned here not with a provision relative to a territory of the United States but with a direct injunction to the Supreme Court of the United States and the Court of Appeals for the Ninth Circuit. The language of the pertinent provision of the Saylor Bill is to the effect:

> "No conviction * * * in the District Court of Guam heretofore had shall be reversed or set aside * * *"

The only courts which can reverse or set aside decisions of the District Court of Guam are the Supreme Court of the United States and the Court of Appeals for the Ninth Circuit. (48 U.S.C. 1422 *et seq.*) The Constitution has provided that:

> "The Congress shall have the power * * * To constitute Tribunals inferior to the supreme

> Court; and * * * "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *"

The judicial power has been defined (Miller, On the Constitution, 314) as:

> "The power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision;"

or in the words of the Court in *Muskrat v. United States,* 219 U.S. 346 it is

> "The right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction".

The judicial power is vested in the Supreme Court by the Constitution; it is submitted that the Congress has no power under the Constitution to restrict or enjoin the Supreme Court directly or indirectly in the exercise of its judicial power as it is attempting to do in the Saylor Bill.

There has been discussion (See Annotated Constitution of the United States Library of Congress 1952 Edition, page 511) of the difference between judicial power and jurisdiction of the Courts of the United States. As pointed out however in *Bataglia v. General Motors,* 169 Fed. 2d 554, citing *Graham v. Goodsell,* 282 U.S. 409, and *Lynch v. United States,* 292 U.S. 571, and referring to this particular problem:

> "We think, however, that the exercise by Congress of its control over jurisdiction (of Federal Courts) is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts *other than the Supreme Court,* it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or take private property without just compensation." (Emphasis added.)

Whether we are discussing jurisdiction or judicial power, the Courts have held that there is no power in the Congress to interfere with the judicial power or jurisdiction of the Supreme Court.

Further, as to both the Supreme Court and the Court of Appeals for the Ninth Circuit, this is a direct violation of the requirements of the due process clause of the Fifth Amendment as indicated in *Bataglia v. General Motors, supra.* The Congress in the Organic Act of Guam has given jurisdiction to the Court of Appeals for the Ninth Circuit and to the Supreme Court to determine appeals from the District Court of Guam. It must in attempting to limit that jurisdiction (of Courts other than the Supreme Court) be governed by the Fifth Amendment. As indicated in the other sections of this brief, with reference to due process, bill of attainder and ex post facto laws, the Congress has obviously violated the provisions of the said amendment.

CONCLUSION.

It is respectfully submitted that for the reasons herein set forth, the petition for writ of certiorari should be denied.

Dated, July 8, 1955.

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(Appendices Follow.)